[ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2019]

No. 19-5237

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Senator RICHARD BLUMENTHAL, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF

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SUMMARY OF ARGUMENT

The Court should dismiss this unprecedented suit by Members of Congress seeking to enforce the Foreign Emoluments Clause against the President of the United States. The Members' response brief only underscores that this extraordinary suit is neither justiciable nor meritorious.

On Article III standing, the Members concede that they must at least show that their votes have been nullified and that they lack legislative remedies. But the President's substantive position that he is not accepting foreign emoluments requiring congressional consent does not nullify the Members' procedural ability to vote on whether to consent to any such emoluments. And the Members have ample legislative remedies to stop the President from accepting the alleged emoluments, even if using those remedies might be more onerous for them than obtaining a judicial order. In any event, separation-of-powers principles foreclose extending the vote-nullification theory to federal legislators, let alone to a legislative minority asserting institutional interests that properly belong to Congress as a whole under the Foreign Emoluments Clause.

On the cause of action, the Members fail to demonstrate that traditional equitable practice authorizes this unprecedented suit. Although they invoke the well-established principle that courts can enjoin federal officers engaged in ongoing constitutional violations, this case bears no resemblance to the traditional applications of that principle. The Members assert institutional injuries in an interbranch dispute,

they request a judicial order directly against the Chief Executive in his official capacity, and their asserted injury (a procedural denial of the ability to vote to approve otherwise-prohibited emoluments) falls well outside the Foreign Emoluments Clause's zone of interests (substantively protecting against the corruption of official action). The Members have not justified any of these novelties, let alone all of them.

On the merits, the Members double down on a sweeping "profit" or "benefit" interpretation of the term "Emolument." They insist that it is immaterial whether this broad interpretation would render superfluous the term "present" in the Foreign Emolument Clause, would be inconsistent with the narrower scope of the other terms in that Clause and related ones in the Constitution, and would be irreconcilable with Executive practice from the Founding era to modern times. Settled principles of interpretation require avoiding those results and thus compel adopting the "profit from office or employment" interpretation that we have urged. As that interpretation excludes the proceeds of ordinary commercial transactions between foreign governments and businesses in which the officer has a financial interest, the Members fail to state a claim.

ARGUMENT

I. THE MEMBERS LACK ARTICLE III STANDING.

The Members acknowledge that they lack any personal injury in their private capacities, Br. 12, and also that they cannot assert any institutional injury on behalf of Congress as a whole, Br. 28. Moreover, although they assert institutional injuries to their own legislative votes under *Coleman v. Miller*, 307 U.S. 433 (1939), they concede that controlling precedent requires them to satisfy (at least) two elements under such a theory—namely, that their votes have been "completely nullified" and that they have no "legislative remedy." Br. 5; *accord* Br. 15, 25-26, 30. This claim fails for two reasons. *First*, even taking the Members' vote-nullification theory on its own terms, they cannot satisfy either of the identified elements of *Coleman*, as those elements were construed in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). *Second*, in any event, the Members' vote-nullification theory improperly jettisons critical additional elements of *Coleman* identified in *Raines v. Byrd*, 521 U.S. 811 (1997)—namely, that *Coleman* involved *state* legislators who had *sufficient votes as a bloc* to defeat the challenged action.

A. The Members' vote-nullification theory fails even under the elements of *Coleman* it retains.

1. The Members' votes have not been nullified.

In *Campbell*, this Court held that *Raines* "used nullify to mean treating a vote that did not pass as if it had, or vice versa." *Campbell*, 203 F.3d at 22 (citing *Raines*, 521 U.S. at 824). And the Supreme Court subsequently reaffirmed that vote

nullification under *Coleman* "concern[s] the results of a legislative chamber's poll or the validity of any counted or uncounted vote." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1954 (2019). Notably, the Members do not and cannot contend that vote nullification has occurred in that narrow sense: the Members identify no instance in which the President has inaccurately treated Congress as having voted to approve his acceptance of the alleged foreign emoluments at issue, and no such instance exists.

Instead, the Members contend that "President Trump is denying [them] specific votes to which they are constitutionally entitled," by "depriving [them] of any prior opportunity to vote on the benefits he is accepting from foreign governments." Br. 13, 26. That contention is fundamentally misguided.

At the outset, the Members refute their own contention. They emphasize that, "[b]ecause acceptance requires affirmative consent, inaction by either House functions as a denial of that consent." Br. 11. The President thus cannot deprive the Members of their right to deny consent to his alleged acceptance of foreign emoluments, because they have already denied such consent (and remain free to provide such consent instead).

Accordingly, the Members err in arguing (Br. 20-21, 27-28) that this case is like *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). Because the voter initiative there vested an independent commission with the power to draw legislative districts, it "was assailed on the ground that it *permanently*

deprived the legislative plaintiffs of their role in the redistricting process" given that the state constitution prevented the legislature from countermanding the initiative. *Bethune-Hill*, 139 S. Ct. at 1954; *accord Arizona State Legislature*, 135 S. Ct. at 2665. Here, by contrast, the President is not preventing the Members from denying consent to his alleged acceptance of foreign emoluments—rather, he disputes that he is accepting foreign emoluments requiring the Members' consent in the first place.

That precise type of interbranch dispute is what this Court in *Campbell* held does not support a claim of vote nullification. There, the legislative plaintiffs argued that President Clinton's use of military force in Yugoslavia nullified their votes against the engagement because they and their colleagues in Congress had affirmatively declined to provide authorization under the War Powers Act and also had declined to declare war under the Constitution. 203 F.3d at 22. This Court responded that the case "differ[ed] from *Coleman* in a significant respect" because President Clinton "did not claim to be acting pursuant to the defeated declaration of war or a statutory authorization," but rather pursuant to his inherent Article II powers. *Id.* So too here, President Trump does not claim to be accepting foreign emoluments pursuant to the non-existent consent of Congress, but rather claims not to be accepting foreign emoluments requiring consent at all.

The Members' sole response to this holding in *Campbell* is that the legislators there purportedly did not "claim interference with their procedural role in voting to declare war" because the Constitution does not "specify[] how that power bears on

the President's military authority." Br. 24-25. Although this rationale for denying standing in *Campbell* is essentially what was proposed in Judge Randolph's separate opinion, it was expressly rejected by the majority opinion: the Court recognized that the legislators there were arguing that President Clinton had "'nullif[ied]' the vote against the declaration of war" by taking "actions that constitute 'war' in the constitutional sense" "simply by ordering U.S. forces to attack Yugoslavia." *Campbell*, 203 F.3d at 23-24.

In sum, this case is nothing more than a disagreement between the Members and the President about whether he is accepting foreign emoluments that require the consent of Congress. *Campbell* squarely forecloses the Members' theory that this interbranch dispute about the Constitution's substantive meaning constitutes procedural vote nullification under *Coleman* and *Raines*.

2. The Members do not lack legislative remedies.

In *Campbell*, this Court further held that "the key to understanding the [*Raines*] Court's treatment of *Coleman* and its use of the word nullification" was that the *Coleman* senators "may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated." 203 F.3d at 22-23; *see also Arizona State Legislature*, 135 S. Ct. at 2665. Notably, the Members not only concede that *Campbell* imposed a "strict limiting principle" that they must show that "Congress cannot remedy their injury," Br. 30, but they affirmatively rely on that requirement in trying to avoid the implication that their position would mean

individual members of Congress could sue to enforce any constitutional provision requiring the consent of one or both Houses of Congress, Br. 29, 31-32. The Members, however, fail to distinguish *Campbell*'s analysis of available legislative remedies.

Campbell observed that "Congress certainly could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign." 203 F.3d at 23. Yet the Members nowhere dispute that Congress likewise could enact legislation that would effectively prevent President Trump from accepting business proceeds flowing from foreign governments, by exercising its sweeping legislative power to regulate commerce with foreign nations and to make laws that are necessary and proper to carry into execution the powers vested in officers of the United States. *See* U.S. Const. art. I, § 8, cls. 3, 18. Although the Members fault the President for not "explain[ing] precisely" "what kind" of legislation could be crafted, Br. 33, 34, it is their burden to establish the necessary elements of standing. It thus would be particularly improper for this Court to accept the Members' unsubstantiated suggestion of doubts—expressed solely by their private lawyers—as to whether they possess sufficient Article I authority to enact legislation that would prevent alleged violations of the Foreign Emoluments Clause by the President.

The Members also emphasize (Br. 34-35) that exercising such authority would likely require obtaining a two-thirds majority of both Houses of Congress to overcome any presidential veto; they object that this flips the "default" position that a

simple majority in one House is sufficient to deny consent to acceptance of prohibited emoluments. But that objection cannot be reconciled with *Campbell*, where a simple majority of the House had been sufficient to defeat an authorization of the air strikes, but a supermajority of both Houses would have been needed to override a veto of legislation banning the strikes. 203 F.3d at 20, 23. And while the Members suggest that Presidents are likelier to veto legislation affecting their personal financial interests, that speculation is both irrelevant and hardly self-evident, as such vetoes may well carry heavier political costs.

Moreover, *Campbell* observed that "Congress always retains appropriations authority and could have cut off funds for the American role in the conflict," 203 F.3d at 23, and that legislative remedy can be wielded through the refusal of a simple majority in one House to act (as could refusals to enact legislation desired by the President). The Members respond that, here, there are no "government funds or personnel" to target because their claim concerns the President's "*private* conduct"; contending that they therefore would need to "retaliate against him on matters unrelated to his emoluments violations," they decry that "startling" result due to the potential "collateral damage." Br. 32, 36. But this is a red herring. Congress has long used control over funds for one matter to influence the President over other matters. For example, when President Washington refused to produce confidential papers concerning a treaty negotiation, the House of Representatives made an "extortive demand" that it would "not appropriate [certain] required funds." *Nixon v. Sirica*, 487

F.2d 700, 734 (D.C. Cir. 1973) (en banc) (MacKinnon, J., concurring and dissenting in part). Such remedies are no less available here. And the funds need not be wholly "unrelated" or withheld in a "damaging" way, because Congress may act in a more tailored fashion if it wishes.

Finally, the Members' objections to the foregoing legislative remedies render incoherent their attempts to limit the breadth of their position. Although the Members concede that their vote-nullification definition applies equally to alleged violations of the Senate's right to consent to certain appointments (and treaties), they suggest that the Senate has sufficient legislative remedies with respect to appointments because that subject concerns official rather than private behavior. Br. 29. But they never explain why that is so. After all, even a supermajority of the Senate cannot remove an unconstitutionally appointed officer; legislation to restrict the officer's conduct would require obtaining support from the House and overriding a potential veto; and such legislation as well as any withholding of appropriations would have collateral effects. Accordingly, it is entirely unclear what the Members' position is concerning the standing of a single senator to sue over any unilateral executive appointment where the senator disagrees with the President as to the need for Senate confirmation. And the same goes *a fortiori* for suits by individual Members of Congress against States that fail to seek consent from Congress when purportedly required by the Constitution, as the States are not part of the federal government at all.

Indeed, given the Members' refrain that the President's position would effectively "eliminat[e] all congressional standing," Br. 35, 37, it is hard to take seriously their suggestion that "the uniqueness of the Foreign Emoluments Clause" would ensure "extremely limited implications of a holding that [they] have standing here," Br. 28-29. In all events, whether or not their legislative-remedy arguments meaningfully narrow their position, those arguments are irreconcilable with *Campbell*.

B. The Members' vote-nullification theory improperly omits key elements of *Coleman*.

1. *Coleman* does not extend to federal legislators.

The Members concede that the Supreme Court has repeatedly admonished that *Coleman*'s holding concerning state legislators does not necessarily extend to federal legislators given the additional separation-of-powers concerns. Br. 20, 26. Yet they insist that those concerns are "ameliorate[d]" by the no-legislative-remedies element of their theory. Br. 30. That is a non sequitur.

As *Raines* explained, the separation-of-powers concern with interbranch litigation is that federal courts do not wield "some amorphous general supervision of the operations of government," but rather sit to adjudicate the "rights and liberties of individual citizens." 521 U.S. at 829. That is why, historically, "in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Id.*

at 826. Such disputes are not "traditionally thought to be capable of resolution through the judicial process." *Id.* at 819.

Congress's lack of alternative remedies against the President in no way mitigates those concerns about the Judicial Branch interposing itself in a dispute between the coordinate political branches. Nor does the fact that the Supreme Court has countenanced providing a federal judicial forum to resolve constitutional disputes between components of a state government in narrow circumstances.

Indeed, although the Members do not contend that they have adequate legislative remedies against States that fail to obtain consent from Congress when that is constitutionally required, the Members nevertheless resist the implication that they could sue such States, gesturing to "untested federalism concerns." Br. 31 n.10. Yet the Members provide no explanation why the separation-of-powers concerns here with interbranch suits are somehow less problematic. To the contrary, whereas federal (executive) officers routinely sue States on behalf of the United States, interbranch litigation finds no support in the historical tradition that properly informs the scope of Article III standing.

2. *Coleman* does not extend to legislative minorities.

Raines described *Coleman*'s holding as limited to situations where the plaintiff-legislators' "votes would have been sufficient to defeat (or enact)" the legislative act at issue. 521 U.S. at 823. Plaintiffs assert that this is not a necessary element of a legislative vote-nullification theory, Br. 27, but that is incorrect. *Raines* characterized

Coleman as itself "repeatedly emphasiz[ing]" that the "legislators (who were suing as a bloc)" had suffered vote nullification because "'their votes … would have been decisive in defeating the ratifying resolution.'" *Raines*, 521 U.S. at 822-23 (quoting *Coleman*, 307 U.S. at 441) (emphasis omitted).

Put differently, the suit by the bloc of *Coleman* plaintiffs was effectively analogous to one where they had authorized themselves to sue on behalf of the state Senate, asserting that the Senate itself had been permanently deprived of its ability to defeat the federal constitutional amendment at issue. *Cf. Arizona State Legislature*, 135 S. Ct. at 2665. The fact that the *Coleman* plaintiffs were not a legislative minority thus at least arguably mitigated the "mismatch between the body seeking to litigate and the body to which the relevant [legal] provision allegedly assigned" authority. *Bethune-Hill*, 139 S. Ct. at 1953.

The Members contend that there is a difference between a legislative body's prior vote being overridden and individual legislators being denied the ability to vote at all. Br. 27. But even setting aside the Members' flawed premise of vote denial, *supra* Part I.A.1, their conclusion does not follow. A legislator's right to vote "is not personal to the legislator but belongs to the people." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). Accordingly, any purported "denial" of Congress's right to vote to deny consent to the President's alleged acceptance of foreign emoluments does not impose any institutional injury on individual legislators absent legislative majorities that are actually aggrieved by the "denial." Contrary to the

Members' suggestion, this case thus bears no resemblance to a hypothetical scenario where an individual member of a government body has institutional veto power because the body operates "solely by unanimous consent." Br. 28. Here, by contrast, these individual Members' votes are immaterial to the institution's decision absent legislative majorities in their respective chambers that agree. *See Raines*, 521 U.S. at 829 (noting that individual legislators "ha[d] not been authorized to represent their respective Houses of Congress").

II. THE MEMBERS LACK A CAUSE OF ACTION.

The Members do not dispute that they lack an express cause of action, and they concede that any implied cause of action must satisfy "traditional principles of equity jurisdiction." Br. 37-38. Yet they fail to show that equitable relief would traditionally be available for this unique type of institutional injury, let alone in a suit brought against the President by individual legislators seeking to enforce the Foreign Emoluments Clause.

A. This suit exceeds the courts' traditional equitable powers.

The Members acknowledge (Br. 40-41) that they are not asserting traditional equitable claims seeking either to preemptively assert a defense to a potential enforcement action or to affirmatively sue to protect a person's property or liberty (which includes freedom from impairments such as discriminatory treatment). *See* Opening Br. 29-30. The Members nevertheless insist that their suit falls within the

tradition of equitable suits against government officers to stop unlawful conduct. Br. 38.

By invoking that traditional type of relief, however, to resolve an interbranch dispute between officials within the federal government, the Members seek a "substantial expansion of past practice" that is "incompatible with [the courts'] traditionally cautious approach to equitable powers, which leaves … to Congress" such policy judgments. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 329 (1999). Although the Members respond (Br. 41-42) that *Grupo Mexicano*'s "rule is about the *type of relief*," not the type of plaintiff who can invoke a traditional remedy, that distinction is irreconcilable with *Grupo Mexicano*'s facts. The Members describe the case vaguely as "involv[ing] a particular kind of preliminary injunction," Br. 41, but the concrete question was whether a particular type of relief—a "creditor's bill" that restrains a debtor's assets—could be sought not just by a traditional "creditor who had already obtained a judgment establishing the debt" but also by "a general creditor … without a judgment." 527 U.S. at 319. Given that the Supreme Court characterized the subtle distinction between suits by post-judgment and pre-judgment creditors as "a wrenching departure from past practice" that "Congress [was] in a much better position" to address, *id.* at 322, it follows *a fortiori* that Congress also must decide whether to displace the fundamental, historical distinction between suits by private parties and by institutional components of the federal government, *supra* Part I.B.1.

The Members object (Br. 41) that the President "offers no precedent drawing [this] proposed distinction," but that flips the burden of persuasion. Although it is "especially" improper to award equitable relief that "has been specifically disclaimed by longstanding judicial precedent," it is sufficient to bar the relief that it "has never been available before." *Grupo Mexicano*, 527 U.S. at 322. And while the Members observe that the Executive has traditionally brought equitable suits on behalf of the government itself to enforce its sovereign prerogatives, Br. 42; *see In re Debs*, 158 U.S. 564, 584 (1895); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976), there is no comparable equitable tradition of interbranch suits by officials within the federal government seeking merely to enforce institutional prerogatives.

B. The President is not subject to equitable relief.

The Members' suit is especially novel because they seek relief not just against a subordinate executive officer, but against the Chief Executive himself. Their attempts to justify such extraordinary relief fail.

In light of the separation-of-powers and constitutional-avoidance concerns, an express statement is at the very least required before even a generally available cause of action may be extended specifically to the President. Opening Br. 32. The Members' response is buried in a footnote (Br. 42 n.12), and it makes no sense. Although the Members concede that the Supreme Court has required a clear statement for an express cause of action for equitable relief and an implied cause of action for monetary relief, they nevertheless insist that a clear statement is not

required for an *implied* cause of action for *equitable* relief. But the Members provide no justification for that inexplicable distinction, which would turn upside-down the constitutional concerns underlying the clear-statement requirement.

The Members also suggest that the Supreme Court's decision applying a clear-statement rule to exclude the President from the express cause of action in the Administrative Procedure Act (APA) was focused on abuse-of-discretion review and was not intended to shield him from suit in a constitutional challenge. Br. 42 n.12. But neither that decision nor the decision of this Court upon which the Supreme Court relied depended on such a distinction. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (citing *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)). Although the President's "actions may still be reviewed" for legality where carried out by *subordinate officials* subject to suit, Congress at a minimum must speak clearly before subjecting the President himself to suit given his "unique constitutional position." *Id.*

The Members similarly fail to justify their position that Congress may constitutionally authorize suits directly against the Chief Executive, notwithstanding the fundamental separation-of-powers principle that courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). The Members suggest that *Mississippi* is limited to "unique responsibilities assigned to the office of the President," Br. 45, but *Mississippi* said no such thing: it spoke generally of the President's "official duties," 71 U.S. at 501, and it involved the duty he shares with his subordinate executive officers

to "faithfully execute[]" the laws, *id.* at 499. Likewise, although the Members suggest that the President's duties in *Mississippi* concerned a "political" question, Br. 45; *see National Treasury Emps. Union v. Nixon*, 492 F.2d 587, 614 (D.C. Cir. 1974), a majority of the Justices in *Franklin* either expressly held or strongly implied that *Mississippi* applies even to purely legal questions such as the requirements governing the census, *see* 505 U.S. at 802-03 (plurality op.); *id.* at 827 (Scalia, J., concurring in part and in the judgment). And unlike cases where the President is sued in his *personal* capacity for his *private* conduct, Br. 46, it is indisputable that the Members have sued the President solely in his official capacity for alleged violations of his official duty to comply with the Foreign Emoluments Clause.

Finally, the Members try to invoke the potential exception that *Mississippi* and *Franklin* left open to order the President to comply with a "ministerial duty," Br. 46, but that exception is inapposite here. President Trump must engage in an "exercise of judgment" as to how to comply with the Foreign Emoluments Clause, just as President Johnson had to do in deciding how to "carry[] into effect an act of Congress alleged to be unconstitutional." *Mississippi*, 71 U.S. at 498-99. The Members emphasize (Br. 47) that *Swan v. Clinton*, 100 F.3d 973, 977-78 (D.C. Cir. 1996), articulated a more expansive view of ministerial duties, but they neglect to mention that the discussion was dicta: this Court emphasized that it had "never attempted to exercise power to order the President to perform a ministerial duty"; identified "painfully obvious" "reasons why courts should be hesitant to grant such relief";

questioned whether its prior decisions "remain good law after *Franklin*"; and ultimately determined that "injunctive relief against subordinate officials" was sufficient there. *Id.* at 978-79. Although relief against subordinate officials is not available here, this Court nevertheless should heed *Swan*'s admonitions against entering extraordinary relief directly against the President—especially absent a clear statement from Congress.

C. The zone-of-interest requirement applies and bars the Members' suit to enforce the Foreign Emoluments Clause.

The Members initially suggest that, in light of *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the zone-of-interests requirement no longer applies to implied causes of action in equity to enforce constitutional claims. Br. 43-44. But the Members never expressly so argue, let alone respond to our showings: (1) that this Court remains bound by the Supreme Court's precedent stating that the zone-of-interests requirement applies to constitutional claims, regardless of *Lexmark*'s implications, Opening Br. 35-36; (2) that *Lexmark* is entirely consistent with that binding precedent because an implied constitutional cause of action is statutorily authorized by Congress's grant of equity jurisdiction to the federal courts, *id.* at 37; and (3) that it would defy the separation of powers and common sense for implied causes of action recognized by courts to be broader than express causes of action delineated by Congress, *id.*

The Members rejoin that the Supreme Court "has routinely adjudicated" equitable constitutional claims "without mentioning" the zone-of-interests requirement. Br. 43-44. But even setting aside that such drive-by opinions lack any precedential effect, the plaintiffs in the cited cases fell squarely within the zone of interests of the constitutional provisions invoked; unlike here, they all were direct objects of allegedly unconstitutional regulation. The Members have failed to identify any controlling precedent actually allowing what they seek here—namely, the "absurd consequence[]" of an implied equitable suit brought by "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated" to those protected by the constitutional provision on which the suit rests. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011).

Turning to the standard for the zone-of-interests requirement, the Members invoke (Br. 44) the "[not] marginally related to or inconsistent with the purposes [of]" standard. But that derives from the APA's "generous review provisions," *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399 (1987), which do not apply to the President, *supra* at 16. Although the Members acknowledge (Br. 44 n.13) that the Supreme Court has discussed a higher showing that may be required under the "one of the class for whose *especial* benefit the statute was enacted" standard, *Clarke*, 479 U.S. at 400 n.16, they emphasize that the higher standard applies to implied causes of action to enforce *statutes*. That is true, but the very reason *Clarke* discussed the higher standard was to illustrate "[t]he difference made by the APA" and to stress the

possibility of a more rigorous "inquiry under whatever *constitutional* or statutory provision" is invoked in non-APA cases. *See id.* (emphasis added).

In any event, the Members fail to satisfy even the APA's more generous standard. The Members agree that the Foreign Emoluments Clause is a prophylactic measure that aims to protect the public at large from the corrupting influence of foreign emoluments on official actions. Br. 1, 9. And the Members do not dispute that they have failed to allege an injury that is in any way related to the corruption of official action. Instead, they simply reprise the alleged denial of their "voting rights" under the Clause. Br. 44. Even assuming, however, that this asserted institutional injury satisfies Article III, it plainly falls well outside the Clause's anti-corruption zone of interests.

This is underscored by comparison to the Domestic Emoluments Clause. As the Members acknowledge, that Clause is an unconditional prohibition, Congress has no role to play under it, and thus the Members are not proper plaintiffs to sue to enforce it. Br. 10. But the Members cannot provide any coherent reason why they nevertheless are proper plaintiffs to enforce the Foreign Emoluments Clause's conditional prohibition, given that Congress's procedural actions *to approve* otherwise-prohibited foreign emoluments, if anything, *undermine* its substantive anti-corruption purpose. Opening Br. 38.

III. THE MEMBERS FAIL TO STATE A CLAIM UNDER THE FOREIGN EMOLUMENTS CLAUSE.

"Emolument" can be construed broadly to mean "any profit" or narrowly to mean "profit from office or employment," and the latter interpretation is strongly supported by the Foreign Emoluments Clause's text, context, and historical application. Opening Br. 39-46. The Members' various efforts to refute that interpretation are unpersuasive.

A. The Members deny that "there was a definition of 'emolument' at the Founding limited to compensation from a government position or an employer-employee relationship." Br. 51. But they conceded otherwise below: "the *Oxford English Dictionary* provides another definition of 'emolument' that was used in the eighteenth century: 'Profit or gain arising from station, office, or employment; dues, reward; remuneration, salary.'" J.A. 294. Likewise, the district court acknowledged that there was a "narrower definition associating 'Emolument' with employment" in Founding-era sources. J.A. 75; *see* J.A. 229 (additional historical evidence supporting the narrower definition).

The Members' sole justification for their about-face rests on a misinterpretation of one of the dictionaries on which we relied. Although they acknowledge that, in *Barclay's A Complete and Universal English Dictionary on a New Plan* (1774), emolument was defined as "profit arising from an office or employ," the Members emphasize that the same dictionary defined "employ" to include "a person's trade, business" and

defined "office" to include "private employment." Br. 51-52. But the mere fact that those terms could be used that broadly in isolation does not mean they should be so construed in this specific context. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). Given that the Foreign Emoluments Clause prohibits acceptance of any "Emolument, *Office, or Title* … *from* any King, Prince, or foreign State," U.S. Const. art. I, § 9, cl. 8 (emphases added), and that the Domestic Emoluments Clause prohibits acceptance of "any other Emolument" "for [the President's] *Services*" "*from* the United States, or any of them," *id.* art. II, § 1, cl. 7 (emphases added), it is entirely reasonable to construe the constitutional term "Emolument" as limited to compensation accepted from a government for services rendered by an officer in either an official capacity or employment-type relationship. Opening Br. 41. Simply put, no dictionary definition alone compels construing the term "emolument" in this constitutional context to encompass profits from ordinary commercial transactions between a federal officer's private businesses and government customers.

B. Once the narrower "office or employment" interpretation is recognized as an available reading, the Members' textual and contextual arguments for the broader "any profit" interpretation all fall apart.

First, the Members emphasize that the Foreign Emoluments Clause covers "any" emolument "of any kind whatever." Br. 48-49. They fail, however, to meaningfully respond to the Supreme Court's repeated instruction that the word "any" does not require adopting the broadest possible definition of the term being

modified, but merely prohibits carving out implied exceptions from the term as properly interpreted in context. Opening Br. 41. Although the Members note that the Clause says both "any" and "any kind," that just rules out implied exceptions for either amount or type.

Second, the Members contend that the text of the Incompatibility Clause—which provides that no legislator shall be appointed to "any Civil Office … the Emoluments whereof shall have been encreased" during the legislator's tenure, U.S. Const. art. I, § 6, cl. 2—shows that the Framers know how to "refer[] only to the emoluments of a government office." Br. 49. But that argument disregards basic grammar. The Incompatibility Clause's phrasing requires a qualifier like "whereof" *regardless* of what "emolument" means, as is evident by substituting "salary" for "Emolument." Accordingly, the Incompatibility Clause in fact supports the President's interpretation, by treating an "Emolument" as an aspect of an "Office" that may be "encreased" by Congress, and thus linking it to the official's employment and duties. The Members also ignore that the Domestic Emoluments Clause similarly supports that interpretation. Opening Br. 42.

Third, the Members argue that the Foreign Emoluments Clause's coverage of "any present, Emolument, Office, or Title" is intended "to ensure a comprehensive sweep" in achieving its "goal of combatting 'foreign influence of every sort.'" Br. 50. But "no law pursues its purpose at all costs," and "the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana v.*

Holder, 558 U.S. 233, 252 (2010). The Clause does not prohibit an official from receiving anything that might permit foreign influence; it prohibits acceptance from a foreign government of only the four specific things enumerated therein (in any amount or type).

Finally, the Members argue that it is immaterial whether their reading of "Emolument" would make the inclusion of "present" redundant, because it is neither necessary nor appropriate to "insist[] on hermetic divisions between" "the Clause's four terms." Br. 49-50. The Members' construction, however, is not a permissible reading of "distinct but overlapping" terms, Br. 49, but rather renders the inclusion of one of the four terms entirely unnecessary, contrary to well-established interpretive rules, Opening Br. 40. In a footnote, the Members resist the conclusion that "present" would be superfluous by suggesting that, even if "emolument" broadly covered any "profit," "advantage," "gain," or "benefit" (Br. 48), it still would not include a "present" with "only sentimental value," such as at least some "photographs." Br. 49 n.14. Even setting aside, however, that such presents would seem to be at least some kind of "benefit," limiting the term "presents" to hypothetical gifts with no monetary value whatsoever would run afoul of the Supreme Court's admonition that "no clause, sentence, *or word* shall be superfluous, void, *or insignificant*." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (emphases added).

C. The Members also cannot reconcile their capacious interpretation with Executive practice from the Founding era to modern times. Opening Br. 43-46.

Although the Members cite various opinions from the Office of Legal Counsel (and the Comptroller General) concerning prohibited payments, Br. 50, 53, they cite no such opinion concluding that federal officers may not receive profits flowing from ordinary commercial transactions between foreign government customers and private businesses in which the officers hold a financial interest in their personal capacities. Br. 50, 53. Moreover, their efforts to refute the historical evidence contradicting their position are unpersuasive.

For example, the Members concede that, on their interpretation, President Washington would have violated the Domestic Emoluments Clause if his purchase of land in the District of Columbia was from the government. Opening Br. 43-44. Although they suggest the purchase was instead a private sale, Br. 53 & n.15, that is factually incorrect, as the land sold by the D.C. Commissioners was land donated to the United States by private parties and thus was public property when purchased by Washington. In fact, the very report the Members invoke describes the purchased lots as "public lots," stating that "[t]he six public lots that Washington purchased during his presidency appear to be among the lots that the proprietors donated for sale, in order to raise funds for the President's House (White House), the Capitol and other government buildings (and return a share of the proceeds to the proprietors)." GSA Inspector General Report 4, Dkt. No. 63-1, app. A. The Members alternatively suggest that the Domestic Emoluments Clause, unlike the Foreign Emoluments Clause, was subject to an implied exception of some kind that allowed Washington's

purchase, but they provide no explanation of why such an exception would exist, much less any evidence that anyone thought it existed. Br. 53.

Even more implausible is the Members' response to the proposed constitutional amendment in 1810 that would have extended the Foreign Emoluments Clause to all private citizens on pain of loss of citizenship. Opening Br. 44. According to the Members, most of Congress and nearly three quarters of the States would have prohibited foreign diplomats from purchasing food, lodging, clothing, or any other products from any citizen anywhere in the country—thereby rendering it virtually impossible to remain in the country—based on a hysterical over-reaction to the events leading to the War of 1812. Br. 52-53. In reality, the public understood that the Clause was limited to payments for the type of employment relationship that could call into question the allegiance even of private citizens, such as "a household servant temporarily hired by a visiting diplomat." Br. 53.

Finally, insofar as modern officials often receive various types of monetary payments from foreign and domestic governments, Opening Br. 45, the Members describe those payments as "far more attenuated" than the ones at issue here, Br. 54. But that is indisputably wrong with respect to interest payments on federal, state, and local bonds—which are direct cash payments from the issuing government to Presidents who have held such bonds—and thus they would be flagrant violations of the Domestic Emoluments Clause on the Members' theory. And even as to things like book royalties and investment proceeds—where payments that indisputably come

from a foreign government flow through third parties en route to federal officials—the Members provide no textual basis to support their inconsistent position: namely, that the presence of those intermediaries somehow means that the official has not "accepted" profit "from" the foreign government in those hypotheticals, *but* that the Trump businesses somehow do not count as intermediaries that break the chain here.

In sum, the Members' position, if applied consistently, would render unconstitutional the unchallenged practices of countless federal officials. For that reason, as well as the conflict with the Foreign Emoluments Clause's text and context, their claim fails on the merits.

CONCLUSION

This Court should reverse the orders below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,432 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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